Mohd Azhan bin Abdul Wahid v Choo Hin Peng

HIGH COURT (IPOH) — CIVIL APPEAL NO 12–13 OF 2009
CHOONG SIEW KHIM JC
21 MAY 2010

Tort — Negligence — Road accident — Damages — Whether sessions court judge erred in finding plaintiff speeding — Whether defendant failed to provide adequate safety measures and proper road signs — Whether plaintiff proven that defendant retained possession and control of site where road works carried out

On 26 July 2002, while the plaintiff was riding his motorcycle from Telok Intan towards Kampong Gajah he was injured in a road accident. It was an undisputed fact that road works were being carried out on the road shoulder of the scene of the accident. The plaintiff claimed damages for personal injuries arising from the accident against the registered owner of the lorry ('the defendant'). It was the plaintiff's case that he was taken by surprise when the lorry suddenly encroached onto his side of the road, especially as there were no road signs on his side of the road to warn him of the impending danger posed by the lorry. The driver of the lorry testified that he was unloading sand from the lorry with the position of the lorry across the road when the accident happened. He also gave evidence that there were flag guards on duty to control and stop traffic as well as road signs in the form of 'Awas' signboards and cones placed in the area. The defendant contended through his witness, the flag guard on duty at the material time, that because the plaintiff was speeding the flag guard was unable to stop him. The sessions court judge dismissed the plaintiff's claim on the grounds that the plaintiff had failed to prove the negligence of the defendant whose version he found inherently more probable. This was the plaintiff's appeal against that decision.

Held, dismissing the appeal with costs:

(1) A perusal of the grounds of judgment showed that the sessions court judge had properly considered relevant evidence before arriving at his finding that the plaintiff rode the motorcycle at great speed. The photographs of a badly damaged motorcycle and the fact that the motorcycle had landed in a drain and not at the spot of collision support this finding. In addition the absence of brake marks showed that there was no attempt to brake and slow down on the part of the plaintiff. Further, the plaintiff's testimony that he had used the same road a day before showed that he had prior knowledge of the condition of the road with ongoing road works. Thus, from the evidence in totality it was more

probable that the plaintiff was speeding and that he had not heeded the flag guard's attempt to stop him (see paras 13–14).

(2) The plaintiff in the present case while juxtaposing his claim that safety road measures and signs were not put up at the place of accident, had totally failed to aver and prove that the defendant was the responsible party to ensure such safety measures were carried out in the context of having control over the work site and the road works. In fact, the specific role of the defendant in the road works was not stated or known and the authority that ordered the road works to be done had neither been identified nor brought in as a co-defendant. As such the plaintiff's claim for the lack of safety road measures and signs must also fail (see paras 16–17).

[Bahasa Malaysia summary

Pada 26 Julai 2002, semasa plaintif menunggang motosikal dari Telok Intan ke Kampong Gajah dia cedera dalam kemalangan jalan raya. Adalah fakta yang tidak disangkalkan bahawa kerja-kerja membaiki jalan sedang dijalankan di bahu jalan di tempat kejadian. Plaintif menuntut ganti rugi untuk kecederaan diri yang berbangkit daripada kemalangan tersebut terhadap pemilik berdaftar motorlori ('defendan'). Adalah menjadi kes plaintif bahawa dia terkejut apabila motorlori tersebut tiba-tiba makan jalannya, lebih-lebih lagi tiada isyarat jalan raya pada bahagian jalannya untuk memberinya amaran tentang bahaya yang akan dihadapi daripada motorlori tersebut. Pemandu motorlori tersebut memberi keterangan bahawa dia memunggah pasir dari motorlori tersebut dan motorlori itu dalam kedudukan melintang jalan raya tersebut apabila kemalangan itu berlaku. Dia juga memberi keterangan bahawa terdapat penjaga bendera yang bertugas mengawal dan menghentikan kenderaan dan juga papan tanda jalan raya 'Awas' dan kon-kon di kawasan tersebut. Defendan berhujah menerusi saksinya, penjaga bendera yang bertugas pada malam itu, disebabkan plaintif memecut, penjaga bendera tidak dapat menghentikannya. Hakim mahkamah sesyen menolak tuntutan plaintif atas dasar bahawa plaintif gagal membuktikan kecuaian defendan yang mana versinya beliau dapati lebih berkemungkinan. Ini merupakan rayuan plaintif terhadap keputusan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Penelitian ke atas alasan penghakiman menunjukkan bahawa hakim mahkamah sesyen telah mempertimbangkan dengan tepat keterangan relevan sebelum mencapai keputusannya bahawa plaintif menunggang motosikal dengan sangat laju. Foto-foto motosikal yang rosak teruk dan fakta bahawa motorsikal tersebut tercampak ke dalam longkang dan bukannya berada pada tempat perlanggaran menyokong penemuan ini. Sebagai tambahan, keterangan plaintif bahawa dia menggunakan jalan yang sama sehari sebelum ini menunjukkan bahawa dia mempunyai pengetahuan tentang keadaan jalan tersebut dengan kerja-kerja jalan

yang sedang dijalankan. Oleh itu, daripada keterangan keseluruhannya, adalah lebih berkemungkinan bahawa plaintif memecut laju dan bahawa dia tidak mempedulikan cubaan penjaga bendera menghentikannya (lihat perenggan 13–14).

(2) Plaintif dalam kes ini sementara mengemukakan seiring tuntutannya bahawa langkah-langkah keselamatan dan isyarat-isyarat jalan raya tidak diletakkan di tempat kemalangan, gagal untuk menegaskan dan membuktikan bahawa defendan merupakan pihak yang bertanggungjawab untuk memastikan langkah-langkah keselamatan tersebut telah diambil dalam konteks mempunyai kawalan ke atas tapak kerja tersebut dan kerja-kerja pembaikan jalan. Malah, peranan khusus defendan dalam kerja-kerja pembaikan jalan tersebut tidak dinyatakan atau diketahui dan pihak berkuasa yang memerintahkan kerja-kerja pembaikan jalan tersebut tidak dapat dikenal pasti dan tidak dijadikan defendan bersama. Oleh itu, tuntutan plaintif atas ketiadaan langkah-langkah keselamatan dan isyarat-isyarat jalan raya juga harus gagal (lihat perenggan 16–17).]

Notes

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1258–1500.

Cases referred to

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Yu Mea Lian & Anor v Government of Terengganu & Ors [1997] MLJU 252; [1997] 4 CLJ Supp 453, HC (distd)

Kuna Sekaran (Farhan Hamid & Kuna) for the appellant.
Selvam Nadarajah (Selvam, Nanda & Partners) for the respondent.

Choong Siew Khim JC:

[1] This is an appeal against the dismissal of a claim for damages for personal injuries arising from an accident between motorcycle AEH 4661 and motorlorry DN 4490 on 26 July 2002. The appellant ('the plaintiff') was the motorcyclist while witness SD1 was the driver of the lorry, the defendant being its registered owner. With reference to the sketch plan, P2, the undisputed fact was that the plaintiff was coming from the direction of Teluk Intan towards Kampong Gajah and road works were carried out on the road shoulder of the scene of accident. This was the plaintiff's version of how the accident happened based on his evidence:

> Tiba-tiba motorlori keluar dari kanan jalan melalui laluan saya. Dekat — tidak brek. Langgar bahagian depan lori.

N1 dan N2 (papan tanda) — dari arah saya tidak ada. Sebelum kemalangan — berada di sebelah kanan.

(Page 43 of the appeal record.)

[2] By way of comment and digression, this method of recording evidence in my opinion is unacceptable where the sentences are not complete but instead broken up and detached. The plaintiff's evidence was heard and taken down by a sessions court judge other than the deciding judge, Tuan Faiz bin Dziyauddin who took over after the plaintiff had closed his case. The plaintiff's case was heard completely by the preceding judge. An objective evaluation of the notes of evidence recorded staccato-style could prove to be difficult for a subsequent judge in circumstances when the preceding judge goes on transfer as often happens or even at the appellate level if the situation warrants it. A prudent and desirable practice of recording evidence by the lower courts as a matter of course would always be in the verbatim and comprehensive form with exception to recording certain questions and answers which is within the discretion of the trial judge to do so.

[3] Be that as it may, it would appear that the deciding judge had no problem comprehending the notes taken down by the preceding judge going by his assessment of the evidence of SP1, SP2 and SP4 (the plaintiff). In this connection, while it is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence, the appellate court has a duty to intervene where a trial court has so fundamentally misdirected itself when arriving at some conclusion (see the Court of Appeal decision in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395).

[4] After having perused the appeal record and considered the written submissions of both parties to this appeal, I do find that this appeal is without merit and ought to be dismissed. Going by his grounds of judgment, the learned sessions court judge had properly considered relevant evidence before finding against the plaintiff when he concluded that the plaintiff had failed to prove the negligence of the defendant whose version he found inherently more probable too. In order to substantiate and to continue with the plaintiff's account of the accident, it was from a distance of 60 feet when he first saw the lorry coming out from the right side of the road on to his lane (left half of the road). He could not brake on time and collided into the front of the lorry. The road was straight and his view was not impeded. He rode at a speed of 70–80 kmph. He admitted there were road works there as he had used the same road the previous day. With regard to road signs warning of such road works, he said these were placed on the right or opposite half of the road. He refuted that road signs N1 and N2 as per the sketch plan were found on his half of the road.

[5] SD1's version was simply that he was unloading sand from the lorry with the position of the lorry across the road when the accident happened. He maintained that there were flagmen to control and stop traffic as well as road signs in the form of 'Awas' signboards and cones placed in the area.

[6] SD2 admitted that he was the only flag guard ('pengawal bendera') stationed at N1 of the sketch plan. His duty at the material time was to stop vehicles because the lorry was unloading sand then. He placed cones at a distance of about 44 feet away from the lorry. To unload, the lorry was positioned across or in the middle of the road. It took the lorry about 15–20 minutes to unload. SD2 further said the motorcycle was speeding:

> Saya tahan motorsikal dan ia laju dan langgar lori.

[7] The motorcycle did not stop although SD2 tried to stop it. In his grounds, the sessions court judge specifically referred to his observation of SD2 while testifying and he found him to be a reliable and credible witness.

[8] On the matter of the road signs to warn road users of the road works, the plaintiff was certain that he only saw road signs on the right half of the road before the accident. His witness, SP1, on the other hand said he did not see any road sign at all when he came upon the scene of the accident. It was obvious from his police report ('P1') that SP1 did not witness the accident.

[9] According to the investigating officer ('SP2'), there were no brake marks and glass fragments on the road, being the normal aftermath of an accident. He identified these damages to the motorcycle which landed in a drain:

(i) Fork depan patah.

(ii) Tangki minyak kemek.

(iii) Lampu besar depan pecah.

(iv) Meter pecah.

(v) Roda depan tercabut/tanggal.

[10] The only damage to the lorry was:

(i) Mudguard kiri depan kemek.

[11] The accident was alleged to have happened at about 3pm. SD1 lodged his police report at 4.54pm (see D9). When SP2 arrived at the scene, it was 5.20pm. He noted that 'Awas' signboards N1, N2 and N3 were found at the scene. These were indicated in the sketch plan P2. However a scrutiny of

photographs P3B and P3G reveals the presence of cones at the scene too although this was not shown in the sketch plan.

[12] In a nutshell, the plaintiff's case hinged on his allegation that he was taken by surprise when the lorry suddenly encroached his side of the road when there were no road signs on his side of the road to warn him of the impending danger posed by the lorry. The defendant contended otherwise through his witness SD2 who said unequivocally that he was the flagman on duty who tried to but failed to stop the speeding plaintiff. I have no qualms in accepting the sessions court judge's finding on SD2's credibility since he was the one who heard and accepted his evidence.

[13] The plaintiff denied he was speeding as against SD2's evidence that he was. Turning to the damages sustained by the two vehicles, I am certain that the sessions court judge arrived at a correct finding when he concluded that the plaintiff rode the motorcycle at great speed based on the resultant damage to the motorcycle. Photographs P3 D and H show a very badly damaged motorcycle. The impact of the collision had the motorcycle landing in a drain. It did not fall at the spot of collision or on the road itself which would have been the case if the plaintiff was not speeding.

[14] If his testimony was true that he was not speeding and he first saw the lorry 60 feet away along a straight stretch of road, he could have averted the collision in such circumstances if he had been riding his motorcycle with due care and attention. The absence of brake marks showed no attempt to brake and slow down on his part. The plaintiff's testimony was therefore not only inconsistent with the outcome of his own foolhardiness but it went against the irresistible inference of excessive speed by which he rode his motorcycle based on the extensive damage to the motorcycle and the spot where it landed after the collision. He had prior knowledge of the condition of the road with ongoing road works as he had used the same road a day before. By speeding, he threw extra caution to the wind by not heeding SD2's attempt to stop him. Gauging from the evidence in totality, the plaintiff's version was rightly found inherently more improbable than the defendant's.

[15] The first three particulars of negligence alleged against the defendant in the plaintiff's statement of claim centred on the defendant's failure to place a flag guard and precautionary road signs/cones at the scene of the road works, giving rise to a situation that endangered road users. On this issue, learned counsel for the defendant relied on the case of *Yu Mea Lian & Anor v Government of Terengganu & Ors* [1997] MLJU 252; [1997] 4 CLJ Supp 453. It was held in this case that the first defendant, the State Government of Terengganu, in engaging independent contractors to excavate the road where the accident happened for the purpose of constructing a culvert, had created a

dangerous situation for which it was solely responsible to provide adequate safety measures and to put up proper road signs at the worksite. Such a responsibility could not be delegated and in failing to put up proper road signs, the first defendant who retained possession and control of the worksite was found wholly liable for negligence as the mishap did not arise from the negligent act of the contractors in carrying out construction work but mainly due to the failure to provide adequate safety measures and road signs.

[16] By analogy, the plaintiff in the present case while juxtaposing his claim that safety road measures and signs were not put up at the place of accident had totally failed to aver and prove that the defendant was the responsible party to ensure such safety measures were carried out in the context of having control over the worksite and the road works. The only evidence in this connection from SD1 for what it was worth was 'projek bukan syarikat saya' when he was cross-examined. The specific role of the defendant in the road works was not stated or known.

[17] The employer or the authority that ordered the road works to be done had not been identified and brought in as a co-defendant in relation to possession and control of the worksite. In this respect, the plaintiff's claim against the defendant must also fail in tandem with his failure to prove the defendant's negligence in the first instance.

[18] Ultimately, the learned sessions court judge having adopted the correct approach in his evaluation of the evidence before finding against the plaintiff, this appeal before me is hence dismissed with costs.

Appeal dismissed with costs.

Reported by Kohila Nesan